

STATE OF MICHIGAN
COURT OF APPEALS

In re DEMARCUS DEVON DAVIS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DEMARCUS DEVON DAVIS,

Respondent-Appellant.

UNPUBLISHED

July 14, 2005

No. 254527

Berrien Juvenile Court

LC No. 2003-000923-DJ

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant, a minor, appeals as of right a jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b, relating to the shooting of another minor after a fight in a local park. Defendant was sentenced to probation. We affirm.

Defendant's first argument on appeal is that he was denied due process and the right to confrontation because the trial court allowed his grandmother to be impeached with evidence that she made inconsistent statements regarding defendant confessing to her that he shot someone. We disagree.

"[T]he general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends to directly inculcate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). As this Court observed in *Kilbourn*, *supra* at 683, a narrow exception to this rule is set forth in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). The exception is as follows: "[I]mpeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Kilbourn*, *supra* at 683.

In the present case the testimony of the police detective that the witness had told him that defendant said he shot someone goes directly to the central issue in the case. However, the

credibility of the witness is relevant to other parts of her testimony. The witness testified that defendant came to her house after the incident. She also testified that defendant thought he had been shot and that he stayed the night at his aunt's house. Further, she testified that she told a police officer that she would bring defendant to the police station and was told to hire a lawyer. She testified to events after the incident to which she had personal knowledge and her credibility on those issues is relevant. Therefore, the trial court did not err in allowing the impeachment testimony because the exception to the rule, that would disallow impeachment on a central issue, is not applicable. And, the right to confrontation is not violated when the "statements [] were not used as substantive proofs but only for impeachment purposes, which is entirely proper." *People v Coates*, 40 Mich App 212, 215; 198 NW2d 837 (1972).

Defendant also argues that trial counsel was ineffective for failing to properly object to the admission of the impeachment evidence. However, when counsel is presented with a situation where prior inconsistent statements are going to be allowed for impeachment purposes, generally he should request a limiting instruction. See *People v Hodges*, 179 Mich App 629, 631; 446 NW2d 325 (1989); *People v Mathis*, 55 Mich App 694, 695; 203 NW2d 310 (1974). In the present case counsel requested a limiting instruction after the testimony and at the close of the evidence, which the court gave. Therefore, counsel in the present case did what was proper and was not ineffective.

Defendant next argues that the jury instructions given to cure the harm of the impeachment testimony exacerbated the harm by confusing the jury because they distorted evidence and referenced irrelevant circumstances. We disagree.

Defendant in the present case has waived his right to appeal the final jury instructions. During a bench conference his attorney had the opportunity to discuss the instructions and agreed on what instructions the jury would be given. After the instructions were given, his attorney was asked whether the instructions reflected what was agreed to and whether there were objections or requests for additional instructions. Because his attorney agreed that the final instructions were reflective of what was agreed on during the bench conference, and did not present objections, he cannot now assert error on appeal. *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000).

However, defendant has not waived review of the instructions given directly after the testimony, because counsel never agreed to those instructions. Because counsel did not object to the instructions at trial the issue is not preserved. Unpreserved claims of improper jury instructions on appeal are reviewed for plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

After the impeachment testimony the trial court instructed the jury as follows:

There has been some evidence that Georgia Mae Johnson, a witness, made an earlier statement that did not agree with her testimony during trial, specifically two statements having to do with an admission or acknowledgment of the Defendant having shot someone and the Defendant being scared and not divulging a location.

You must be careful how you consider this evidence. The statement was not made during this trial. So you must not consider it when you decide whether

the elements of the crime have been proven. On the other hand, you use it to help you decide whether or not you think the witness is truthful. . . . Remember that you may only use it to help you decide whether you believe the witness's testimony here in court.

However, if the witness testified that the earlier statement was true or if the earlier inconsistent statement was given under oath subject to the penalty of perjury at a trial or hearing it may be considered as proof of the fact of the statement. That is not the situation before the jury at this time.

Defendant argues that the instructions were improper because the witness was never asked about her prior statement to police regarding defendant's whereabouts and the court, therefore, insinuated that she made a prior inconsistent statement. However, the witness was directly asked whether she made the statements to the officers about defendant's location, though she did not answer the question until it was later rephrased. She denied telling the officer that she had heard from defendant after the incident. The witness stated that defendant stayed at his aunt's house, which is inconsistent with the statement she made to police. "MRE 613(b) merely requires that a witness be afforded an opportunity to explain or deny the statement and that the opposing party be offered an opportunity to interrogate the witness on it." *Westphal v American Honda*, 186 Mich App 68, 71; 463 NW2d 127 (1990). "A witness is not required to verify he made the statement before it can be admitted in evidence." *Bradbury v Ford Motor Co*, 123 Mich App 179, 188; 333 NW2d 214 (1983). Because the witness was given the opportunity to explain or deny the statement she made to police, the requirements of MRE 613 have been satisfied, regardless of whether she responded directly to the questioning. No clear error resulted in allowing the testimony.

Defendant argues that the last paragraph of the instructions that tell the jury when a prior inconsistent statement can be used as substantive evidence confused the jury. However, "[e]ven if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

In the present case, the instructions as a whole accurately stated the law. The paragraph in question is a more in-depth explanation of impeachment and the difference between allowing the statement for impeachment and as substantive evidence. It was offered as a way of further explanation. Also, the trial court differentiated for the jury and informed them that the explanation did not apply to the case. No clear error resulted from the jury instruction because the instruction was accurate and helpful and defendant's rights were protected.

Defendant also argues that trial counsel was ineffective for failing to object to the jury instructions because they were confusing and increased the risk of harm to defendant. As stated previously, the instructions were not in error and defendant's rights were protected. Therefore, any objection by defense counsel would have been futile and counsel is not ineffective for failing to make a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next argues that the prosecutor infringed on defendant's Fifth Amendment right to remain silent by offering his silence as substantive evidence of guilt. We disagree.

Initially, the prosecutor questioned defendant regarding why he did not go to the police after the incident. The credibility of a witness can be attacked by showing that the witness failed to speak or act when it would have been natural to do so if the facts were as the witness portrayed them to be. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). In the present case, defendant testified that the victim pulled out a gun and it was accidentally discharged as defendant was trying to keep the victim from pointing it at him. He then testified that he thought he had been shot when the gun went off. If the facts were as defendant testified, it would have been natural for defendant to contact the police to seek protection or to have the victim arrested. Therefore, it was proper for the prosecutor to impeach defendant's testimony with his failure to contact the police.

Later, defendant was questioned about why he did not tell his side of the story after he turned himself in. The privilege against self-incrimination applies when a defendant was subjected to police interrogation while in custody or deprived of his freedom in any significant way. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992). It also applies when a defendant's silence follows *Miranda*¹ warnings. *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). When the privilege applies, a defendant's silence cannot be used to impeach exculpatory testimony. *People v Boyd*, 470 Mich 363, 374; 682 NW2d 459 (2004).

In the present case when he was asked why he did not go to police or tell police his version of the story, defendant claimed it was because the police had not done anything in the past about other issues when they were contacted. He also claimed it was because a police officer told his grandmother that he should get a lawyer. There is no evidence that defendant was ever given his *Miranda* warnings or asserted his right to remain silent; therefore, no error resulted in admitting defendant's silence to impeach him or as substantive evidence. *Solmonson, supra* at 664-665.

Defendant also argues that counsel was ineffective for failing to object to the prosecution's reference to defendant's silence. However, any objection by counsel would have been futile because, as noted above, the testimony regarding defendant's silence was properly admitted to impeach him and there was no evidence to suggest defendant had been given *Miranda* warnings or invoked his right to silence requiring exclusion of any post-arrest statements. Defense attorneys are not required to make futile objections. *Kulpinski, supra*, at 27. Therefore, counsel was not ineffective.

The final issue on appeal is that trial counsel was ineffective for failing to request that the jury be instructed on the defense of accident. We disagree.

When addressing a claim of ineffective assistance of counsel we must determine: "(1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). In the present case the trial court instructed the jury as follows:

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The Defendant says that he is not guilty of Assault With Intent To Do Great Bodily Harm Less Than Murder. The Defendant says that his conduct was accidental. If the Defendant did not intend to assault with intent to do great bodily harm less than murder, then he is not guilty. The Prosecutor must prove beyond a reasonable doubt that the Defendant intended to commit assault with the intent to do great bodily harm less than murder.

That instruction is identical to CJI2d 7.3a, which is the instruction for accident as a defense to a specific intent crime. Even if defendant was able to show that it was not reasonable for counsel to fail to make the request for the jury instruction, no prejudice could have resulted because the jury was instructed on accident anyway. Therefore, defendant's claim that counsel was ineffective is without merit.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Pat M. Donofrio